IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS RALPH MONTANO, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 22,420

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

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I.

JURISDICTIONAL STATEMENT OF FACTS

The Government accepts the Jurisdictional Statement of Facts of Appellant with the following addition: At trial Appellant had retained counsel, and on appeal, Appellant had appointed counsel.

(Hereinafter the Transcript of the Record, Volume I will be referred to as "RC"; the Reporter's Transcript of the testimony at trial will be referred to as "RT," the number following will refer to the page, and the number following "L" will refer to the line; the Appellant will be referred to as "Montano" or "Appellant.")

II.

STATEMENT OF FACTS

The Government accepts the Appellant's Statement of Facts.

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The Trial Court did not err in denying Appellant's Motion to Suppress.

2. The Trial Court did not err in denying Appellant's Motion to Order Government witnesses to make disclosure to Appellant.

3. The Trial Court did not err in denying Appellant's Motion for Mistrial based on a statement made in the opening statement by Government's Counsel.

4. The Trial Court did not err in admitting the Government's exhibits which contained marihuana.

5. The Trial Court did not err in refusing Appellant's requested instruction number 1.

6. The Trial Court did not err in refusing the questions proposed by Appellant in chambers for voir dire of the jury.

IV.

SUMMARY OF ARGUMENT

1. A search of a vehicle at a port-of-entry whose occupants stated they came from Mazatlan, Mexico, i.e., the interior of Mexico was a border search.

2. The Motion to Order Government Witnesses to Make Disclosure was linked to a Motion to Continue Trial and was properly refused in view of the Government's Response in its Opposition to the Motions.

3. The statement in the Government's Opening Statement which was not admitted into evidence was harmless error, if error it was.

4. The marihuana exhibits contained bulk marihuana, i.e., the plants, stems and seeds, as well as the leaves, and are Cannabis sativa L. as defined in 26 U.S.C.A., §4761.

5. There is no basis in law for Defendant's Requested Instruction Number 1.

6. The Trial Court did not abuse its discretion in conducting the voir dire of the panel.

V.

ARGUMENT

1. A search of a vehicle at a port-of-entry whose occupants stated they came from Mazatlan, Mexico, i.e., the interior of Mexico, was a border search.

The Motion to Suppress was submitted on stipulated facts, but as was brought out in the testimony at trial by Edmund Eccleston who saw the car Appellant was driving approach the port-of-entry from Mexico:

"A I asked them their citizenship and asked them where they were coming from and asked them if they brought any merchandise with them from Mexico.

"Q What was answered by Mr. Montano?

"A Both declared to be U.S. citizens and they were coming from Mazatlan and were bringing no merchandise at all.

"Q What did you do?

"A Well, they were coming from Mexico, the interior, which is south of the town of Nogales, Sonora, we refer all cars to secondary inspection coming from the interior. So then I informed them to go to the secondary for further inspection and announced on the public address system that the car, told them it was coming down, which we do with all cars coming from the interior.

"Q Do you have a code or signal for that?

"A Yes, we do.

"Q What is it?

"A A car coming from the interior is called 101.

"Q Did Mr. Montano say anything after you told him he was going to secondary?

"MR. HIRSH: Pardon me. Let me again object to this on the grounds of insufficient foundation by the Government for any statements by this defendant.

"THE COURT: No. This is merely on his entry into the United States. The objection is overruled.

"A Mr. Montano wanted to continue on, he had trouble with the transmission of his car and didn't want to stop because he was afraid he couldn't get his car going again. I told him he would have to go on down, that it was for further inspection.

"Q (By Miss Diamos) And did they drive toward secondary?

"A Yes, they did." (RT 20, L 9 to 21, L 16)

When the car's luggage was searched in secondary, the Inspector noticed a space between the rear seat and the luggage compartment; he jabbed at it and there was resistance.

He pulled the divider inside and felt a bag there (RT 34, L 10-19).

Appellant, citing from *Marsh v. United States,* (5th Cir., 1965) 344 F.2d 317, states: "That Court further stated that the reasonableness of the border search and the necessity for probable cause to search those lawfully within the country are both clearly stated in *Carroll v. United States,* 267 U.S. 132 (1925)."

The statutory basis for a border search is 19 U.S.C.A. 482. It is:

"482. SEARCH OF VEHICLES AND PERSON

Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. §3061."

The historical note gives the derivation of 19 U.S.C.A. 482 as Act, July 18, 1866 c. 201 §3, 14 Stat. 178.

The United States Supreme Court in *Boyd vs. United States,* 116 U.S. 616, 29 L.Ed. 746, 6 Sup. Ct. 524, traced the history of the third section of Chapter 201. It stated that statutes

provided for seizure of forfeited goods and had been authorized for two centuries prior to the adoption of the U.S. Constitution and since the first statute passed by Congress to regulate the collection of duties contained provisions to this effect (Act of July 31, 1789, 1 Stat. at Large 29, 43, Chap. 5) was passed by the same Congress which proposed for adoption the first amendments to the Constitution, ". . . it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the (Fourth) Amendment," *Boyd vs. United States,* supra, at page 623.

This Court in *Murgia vs. United States,* (9th Cir., 1960) 285 F.2d 14, at page 17, reiterated this principle. "(The) searches of persons entering the United States from a foreign country are in a separate category from searches generally** (and) 'are totally different things from a search for and seizure of a man's private books and papers***.' "

Thus the principle has long been recognized, in fact, from the inception of the Fourth and Fifth Amendments that border searches are in a separate category.

This Court in *Murgia vs. United States, supra,* quoted with approval from *Landau vs. United States, Attorney for Southern District,* 2 Cir., 1936, 82 F.2d 285, which stated the broad effect of the border search rule. The court therein stated at page 286:

> "As early as 1799, the baggage of one entering the country was subject to inspection (1 Stat. 662). The necessity of enforcing the customs laws has always restricted the rights of privacy of those engaged in crossing the international boundary. See Carroll v. United States, 267, U.S. 132, 154, 45 S. Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790. *Neither a warrant nor an arrest is needed to authorize a search in these circumstances.* In the instant case, there was no disturbance of the appellant, his residence, or his effects

after a completed entry. It was to these evils that the Fourth Amendment was directed. Boyd vs. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746. It has been said 'Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.' See United States v. Kirschenblatt, 16 F. (2d) 202, 203, 51 A.L.R. 416 (C.C.A.2). *Although inspection of the person and baggage upon entry may be carried so far, or be so conducted, as to constitute an unreasonable search,* it is clear that such is not this case." (emphasis supplied).

Clearly, then whether there is in fact an arrest or not, the test is reasonableness which is a strict test, to quote from *Blackford vs. United States* (9th Cir., 1957) 247 F.2d 745, at page 750:

"Thus, we must apply the test of reasonableness to the conduct of the officers in the case at bar. This is a stricter test that (sic.) that applied to state proceedings under the Due Process Clause of the Fourteenth Amendment in Rochin and Breithaupt. The test there is whether the alleged activity of law enforcement officers in obtaining the questioned evidence fell short of civilized standards of decency and fair play. There may be, we conceive, conduct which, while unreasonable, is not so unconscionable that it 'shocks the conscience' or 'offend[s] a sense of justice.' Rochin, 342 U.S. at page 172, 72 S.Ct. at page 208. On the other hand, if conduct is reasonable, it must perforce satisfy Due Process requirements. Accordingly, if the actions here questioned were reasonable, they did not constitute a violation of either the Fourth or Fifth Amendments."

Title 19 U.S.C.A., §1461, provides:

"All merchandise and baggage imported or brought in from any contiguous country, except as otherwise provided by law or by regulations of the Secretary of the

Treasury, shall be unladen in the presence of and be inspected by a customs officer at the first port of entry at which the same shall arrive; and such officer may require the owner, or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise, or other container, or of any closed vehicle, to open the same for inspection, or to furnish a key or other means for opening the same. June 17, 1930, c. 497, Title IV, §461, 46 Stat. 717."

Thus, when the Inspector found an unaccounted for space, and pressed the panel and found resistance, surely it cannot be argued that when the Inspector put his arm into this space and found a sack the search was unreasonable.

2. The motion to order Government witnesses to make disclosure was linked to a motion to continue trial and was properly refused in view of the Government's response in its opposition to the motions.

Appellant filed a "Motion for Continuance and Order Ordering Government's Witnesses to Make Disclosure to Defendants" two days before the second time a trial was scheduled. (RC Item 10)

As was stated by the Government in its response opposing the Motion to Continue:

"This Response of Government and Memorandum in Opposition to Defendants' Motion to Continue, by Edward E. Davis, United States Attorney for the District of Arizona, by Jo Ann D. Diamos, Assistant United States Attorney, is submitted in response to Defendants' Motion for Order directing Government's witnesses to talk to defense attorneys and for continuance of the trial date.

The records of this case show that this case was set for trial March 28, 1967. Defense attorneys then requested

a continuance and this case was then set for trial on September 14, 1967.

Some eight months after their arraignment Defendants filed a Motion to Suppress. Now, some two days before the date set for trial, again the Defendants are seeking a continuance. Counsel admit that Government's counsel made its file available to defense counsel. They not only had the probable list of Government witnesses, but a summary of their testimony. Now defense counsel seek an order compelling Government witnesses to talk to defense counsel. What the Court wishes to do—this aspect of the Motion lies in its sound discretion. However, it is respectfully submitted, the motion for continuance becomes an abuse by defendants' counsel. Another continuance would only weaken the Government's case by permitting the trial to be put off again.

As the Court knows, the Motion to Suppress was submitted on stipulated facts, i.e., the two defendants sought entry into the United States from Mexico at the Grand Avenue Port of Entry, they were referred to the secondary inspection area because they stated they came from the Interior, and here the contraband was found. The facts therefore are relatively very simple.

What defense counsel seek is to have the Government be compelled to lay its entire case before Defendants, to have the matter then tried at some unknown date in the future and then face the probable argument of how can Government witnesses recall facts so long after the event, i.e., January, 1967 to trial date.

It is respectfully submitted, that in view of both defense counsels' previous trial experience in this Court, the Motion to Continue should be denied, and the Government prays the Court exercise its sound discretion in acting on the Motion to compel the Government's witnesses to talk to defense counsel." (RC Item 11)

The Court denied the Motion to Continue and Order Or-

dering Government's Witnesses to Make Disclosure was denied (RC Item 35 minute entry dated September 13).

As was expected, Appellant's Counsel on cross-examination of Edmund Eccleston (RT 20-21) and of Roger Walker (RT 43) tried to attack their specific recollection.

Appellant had the benefit of the Government's case report prior to trial. He did try to talk to some of the witnesses before trial, but as Robert Boyd stated in answer to Appellant's counsel's question:

"Q Were you willing to discuss the case with me?

"A You asked me if I wanted to discuss the case with you, I said I preferred not to." (RT 55, L 16-18)

However, he did not try to talk to all the witnesses:

"Q Do you recall my consulting with you this morning and requesting you to discuss this case with me?

"A No, sir, you did not consult with me." (RT 92, L 12-14)

Here, the Appellant had a list of the Government witnesses to which he is not entitled, and their Jenckes Statute Statements were made available well prior to trial, to which he was not entitled until the witness had testified, 18 U.S.C.A. §3500.

It is respectfully submitted that the Appellant was not entitled to such an order and there was no error in denying it.

3. The Statement in the Government's Opening Statement which was not admitted into evidence was harmless error, if error it was.

Appellant argues there was prejudicial error and grounds for a mistrial because the Government's counsel stated in the opening statement that when the Inspector reached into a panel at the rear of the trunk of the vehicle and felt a sack, he asked Appellant "what's in here" and the Appellant replied "it's ballast."

When Inspector Roger Walker was testifying the following occurred:

"A After I had checked both the front of the car, the front seat and the trunk, I became curious of some unaccountable space between the seat and the trunk, from the trunk I poked at it and jabbed at it and there was resistance. It looked like an empty space. There was a divider there I pulled aside, I reached my hand in, I could not see but I could feel what I felt to be a sack or burlap bag of some kind stuffed with something. Still without having looked at it, I asked Mr. Montano what that might be in that sack and the answer was —

"MR. HIRSH: Pardon me. At this time I renew my objection on the grounds of further indication at this point the situation has changed, no showing of voluntariness or no compliance with the Rule in the Miranda case.

"THE COURT: The objection will be sustained." (RT 34, L 10-24)

Before releasing this witness on direct examination, the Government's counsel asked to take up a matter of law outside the hearing of the jury. (RT 37, L 3-4) The jury was excused, and then the following occurred:

"THE COURT: Let the record show that the jury is entirely withdrawn from the courtroom, the defendant is present and counsel are present.

"MISS DIAMOS: Your Honor, going back to that statement, I think the Court ruled that a showing would have to be made that it was voluntary.

"THE COURT: Well, I think you have to show he was advised of his rights in addition to its being voluntary.

"MISS DIAMOS: I don't believe any such showing can be made. I am refering to when Mr. Walker recalled when he felt inside that partition and felt the gunny sack, he asked Mr. Montano what it was.

"THE COURT: I say to you frankly that I don't believe it is within Miranda. But I don't think it is going

to make much difference in the case. To be certain you make no mistake, I am not going to let him tell about the answer. That is the basis for my ruling.

"MR. HIRSH: I have two matters, Your Honor, as long as the jury is not present at this time." (RT 38, L 1-19)

After raising objection on the voir dire of the jury, Appellant's counsel then stated:

"MR. HIRSH: I have one other matter, if it please the Court. I would at this time move for a mistrial on the grounds that the United States Attorney in her opening statement stated she was going to show through Customs Inspector Walker that a certain statement was made by Mr. Montano relative to what the bags were doing, the particular place the bags were there to weight the car down.

"THE COURT: Mr. Hirsh, I told you a moment ago I really think that was entirely proper and I could not say the United States Attorney was in bad faith in making that statement during the opening statement. As a matter of fact, I have grave doubt I am giving the United States fair treatment in sustaining. I am merely doing it in bending over backwards in favor of your client. For that reason I will deny the motion for a mistrial." (RT 40, L 4-18)

Appellant's counsel argues that the Government's case was weak and that the opening statement supplied the missing evidence, citing *Jones vs. United States* (D.C. Cir., 1964) as in 330 F.2d 553 but which is 338 F.2d 553.

Appellant was the driver of, and therefore had custody of, the vehicle in which the contraband was found. Approximately 43 pounds of bulk marihuana, and from which some 160 amphetamine tablets were removed from the right arm rest (RT 59-63, L 11).

The inference created by the statute (21 U.S.C.A., §176a) was not overcome by an explanation, such as, that the car was left unattended in Mexico and that in that way someone

had used the car to transport. Perhaps Appellant is arguing there was no evidence of knowledge of the presence of the contraband and that, therefore, the inference would not arise. However, it is respectfully submitted there was not such a lack of evidence as in the Jones case to make the statement in the opening statement prejudicial. Further, it is respectfully submitted the statement was not within the Miranda rule (*Miranda v. Arizona,* 1966, 384 U.S. 436).

It is respectfully submitted there were no grounds for a mistrial.

4. The maihuana exhibits contained marihuana, i.e., the plant, stems and seeds, as well as the leaves, and are cannabis sativa L. as defined in 26 U.S.C.A. 4761.

Title 21 U.S.C.A. §176a provides in part:

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Title 26 U.S.C.A., §4761, provides in part:

"(2) Marihuana.—The term 'marihuana' *means all parts of the plant Cannabis sativa L., whether growing or not;* the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." (emphasis supplied)

The Government chemist testified she examined the seeds and the leaves (RT 118 and 119, L 21 to 120, L 6).

It is respectfully submitted the marihuana exhibits were properly admitted.

5. There is no basis in law for Defendant's Requested Instruction Number 1.

Defendant's Requested Instruction Number One as set out on page six of Appellant's Opening Brief alleges the Government must prove a "psychotrophic offense." There is no basis in law for such an instruction. (Please see argument numbered four immediately preceeding.)

6. The Trial Court did not abuse its discretion in conducting the voir dire of the panel.

Rule 24(a), Federal Rules of Criminal Procedures, Title 18, U.S.C.A. provides:

> "(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

The record reveals as follows:

> "MR. HIRSH: Ladies and gentlemen, I wonder if I could get a show of hands or people that have sat on prior criminal cases. Mr. Larue, can you hear me all right?
>
> "MR. LARUE: Yes.
>
> "MR. HIRSH: All right, sir. You have had prior jury duty on a criminal case?
>
> "MR. LARUE: Yes.
>
> "MR. HIRSH: What kind of case was that?
>
> "THE COURT: Mr. Hirsh, we are concerned with this case and there is no point in going into what other cases

he tried. He told you he sat on criminal cases and that is sufficient in order for you to proceed with your voir dire." (RT 15, L 6-17)

He then asks to make a record on it. At the first recess he alleges it would be an undue burden on the defense to search through files to determine previous jury duty and their verdict (RT 39, L 8-13). Appellant's Counsel would subject a juror to an itemization of the previous trial the juror has sat on and the verdict rendered. How this, i.e., the Court's not permitting it, constitutes an abuse of discretion is beyond this counsel's comprehension. The Court properly exercised its sound discretion.

In the Trial Court, each counsel is furnished with the entire jury panel which sets out the age, address, spouses, jobs and children, if any, and also if prior to the present panel they have or have not had jury experience. (This is not in the record, but is offered in explanation of the lack of these type of questions in the voir dire of the trial panel, See RT 7, L 22 to 17, L 10.)

Appellant's counsel alleges at page 32 of Appellant's Opening Brief:

> "The worst vice of not allowing appellant to ask this question was the fact that the United States Attorney prosecutes two to three cases weekly in front of the same jury panel for a six month period and is completely familiar with each and every juror and with each case that juror has sat on during the time that the juror has been on the panel."

What this means is not clear; it could cast a slur on the ethics of Government's counsel or it could mean the Government's counsel strikes jurors who have rendered not guilty verdicts. If the former is meant, it is respectfully submitted there is no basis in fact; if the latter is meant; six preemptory

challenges allowed the Government would not have been enough.

It is respectfully submitted the Trial Court exercised its discretion soundly. *Johnson v. United States* (9th Cir., 1959) 270 F.2d 721 at page 724, Cert. den. 362 U.S. 937, 4 L.Ed. 2d 751, 80 S.Ct. 759.

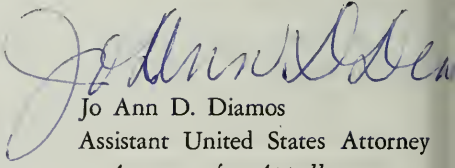
VI.

CONCLUSION

It is respectfully submitted that the evidence was properly submitted and admitted and there was no prejudice to the actual rights of the Appellant.

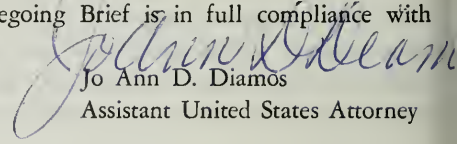
Respectfully submitted,

Edward E. Davis
United States Attorney
For the District of Arizona



Jo Ann D. Diamos
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Jo Ann D. Diamos
Assistant United States Attorney

Three copies of the Brief of Appellee mailed this 14th day of February, 1968, to:

ROBERT J. HIRSH
45 West Pennington
Tucson, Arizona 85701
Attorney for Appellant